UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CHRISTIAN A. RODRIGUEZ, Plaintiff, v. COUNTY OF KINGS, et al., Defendants.	1: 05-CV-00573-OWW-SMS ORDER GRANTING PLAINTIFF'S MOTION TO AMEND COMPLAINT (DOC. 6) ORDER DIRECTING PLAINTIFF TO FILE THE FIRST AMENDED COMPLAINT NO LATER THAN TEN DAYS AFTER THE DATE OF SERVICE OF THIS ORDER FINDINGS AND RECOMMENDATION TO DENY PLAINTIFF'S MOTION TO REMAND ACTION FOR DEFECT IN REMOVAL PROCEDURE (DOC. 6) FINDINGS AND RECOMMENDATION TO DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION AND TO REMAND ACTION TO STATE COURT

Plaintiff is proceeding with a civil action in this Court. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rules 72-302(c)(1) and 72-303.

I. Background

On April 27, 2005, Defendants filed in this Court a notice of removal of the instant action from the Kings County Superior Court. The notice of removal and attached document reveal that the action had been commenced on or about January 24, 2005, and

Defendants had been served with notice of the action on April 4, 2005. The basis of removal was that this Court had original jurisdiction pursuant to 28 U.S.C. § 1331 because the action contained claims pursuant to 42 U.S.C. § 1983. (Notice at 2.)

The Defendants include the County of Kings, the Kings County Probation Department, and the Kings County Sheriff's Department, as well as named individuals who are employed by and have positions of authority within the Kings County Sheriff's and Probation departments. The complaint reflects that Plaintiff seeks compensatory and punitive damages for personal injuries sustained when Plaintiff was incarcerated at the Kings County Juvenile Boot Camp. Most of the claims are based on state tort law: some allege negligent conduct (on various theories, including California statutory law) (claims one through three); another asserts intentional infliction of emotional distress (claim seven). There are three claims pursuant to 42 U.S.C. § 1983, including intentional or deliberate indifference to Plaintiff's medical needs and failure to protect Plaintiff from conditions posing a substantial risk of serious harm (claims four through six).

The case has not been scheduled. No answer has been filed. Defendants filed a motion to dismiss for failure to state a claim, motion for more definite statement, and motion to strike on May 4, 2005; opposing papers were filed by Plaintiff on May 27, 2005; and a reply was filed on June 3,2005. By minute order dated June 7, 2005, the hearing on the motion to dismiss was continued from June 13, 2005, to August 1, 2005.

The Plaintiff's motions to remand and amend the complaint

were filed on May 26, 2005, including the motion itself, a supporting memorandum, a declaration of Tracy E. Sagle, and a proposed order. A responsive memorandum and declaration with exhibits were filed on June 16, 2005. A reply and declaration of Sagle were filed on June 24, 2005.

By separate order, the hearing set on the motions was vacated, and the motions to amend and to remand were deemed submitted for decision and findings and recommendations, respectively.

II. Motion to Remand Action

A. Magistrate Judge's Jurisdiction to Determine the Motion

Title 28 U.S.C. § 636(b) provides in pertinent part:

> (1) Notwithstanding any provision of law to the contrary--
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief may be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

Fed. R. Civ. P. 72 provides in pertinent part:

> (a) **Nondispositive Matters.** A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall

> promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.
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> (b) **Dispositive Motions and Prisoner Petitions.** A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

The question presented is whether a motion to remand a proceeding to state court is a nondispositive motion that a magistrate judge can determine, or a dispositive motion that a district judge must determine so that a magistrate judge may only issue findings and recommendations. Some of the circuit courts of appeals have held that motions to remand are dispositive, and thus a magistrate judge does not have jurisdiction to determine such a motion. The reasoning is that although such motions are not enumerated in § 636(b)(1)(A), they nevertheless are functionally the equivalent of a motion for involuntary dismissal because they determine that there will not be a federal forum available to entertain a particular dispute. Vogel v. U.S. Office Products Co., 258 F.3d 509, 514-17 (6th Cir. 2001) (noting a lack of decisions from other circuits); First Union Mortgage Corp. v.

Smith, 229 F.3d 992, 994-97 (10th Cir. 2000); In re U.S. Healthcare, 159 F.3d 142, 145-46 (3d Cir. 1998). The Ninth Circuit has not taken a position on whether or not a Magistrate Judge can rule on a motion to remand an action to state court. Some district courts have taken the position that a motion to remand is not dispositive and thus may be determined by a magistrate judge. See Bearden v. PNS Stores, Inc., 894 F. Supp. 1418, 1419 n. 1 (D. Nev. 1995). The present motion, if granted, will terminate the availability of a federal forum. In an abundance of caution, the Magistrate Judge will thus proceed by way of findings and recommendations.

B. The Motion

Title 28 U.S.C. § 1446(a) mandates that a "defendant or defendants" desiring to remove any civil action from a state court to file in the district court a notice of removal and copies of the papers filed upon "such defendant or defendants in such action."

It is established that all defendants must join in the removal of an action, or the removal is procedurally defective. Hewitt v. City of Stanton, 798 F.2d 1230, 1232-33 (9th Cir. 1986). This has been interpreted to mean that there be "some timely filed written indication from each served defendant, or from some person or entity purporting to formally act on its behalf in this respect and to have the authority to do so, that it has actually consented to such action." Gillis v. Louisiana, 294 F.3d 755, 759 (5th Cir. 2002); Foley v. Allied Interstate, Inc., 312 F.Supp.2d 1279, 1283 (C.D.Cal. 2004) (citing Getty Oil Corp. v. Ins. Co. of North America, 841 F.2d 1254, 1262 n. 11 (5th Cir. 1988), and

holding that consent by a corporate party's general counsel held sufficient even where the party had retained separate counsel); Simpson v. Union Pacific R.R. Co., 282 F.Supp.2d 1151, 1153-54 (N.D.Cal. 2003) (holding that a signed letter from co-defendant's counsel was sufficient where the letter was ultimately filed with the Court).

Here, the Defendants' notice of removal was filed by counsel who described themselves as "Attorneys for Defendants, COUNTY OF KINGS, et al." (Notice of Removal at 1.) The notice states, "Defendants, COUNTY OF KINGS, et al, hereby give notice of the removal...." (Id.) It refers to the notice of removal having been filed by "the defendants" (id. at 2); and it refers to the "Defendants" as having been served with notice of the action when the "public entity defendants were served with a copy of the complaint," (id.). The notice was signed by James D. Weakley of Weakley, Ratliff, Arendt & McGuire, LLP, as "James D. Weakley, Attorneys for Defendants." (Id.) The declaration of attorney Leslie M. Dillahunty, submitted in opposition to the motion to amend and remand, notes that the Defendants' motion to dismiss the complaint was electronically filed with this Court and that notice thereof was received from the Court with an indication that the motions had been filed on behalf of all defendants named in the complaint.

The Court concludes that there is no ambiguity in the notice of remand, and there is no basis for an inference that Defendants' counsel does not constitute the authorized representative of the Defendants in this action. The Court concludes that all defendants joined in the removal of the case.

Accordingly, it will be recommended that Plaintiff's motion to remand the action based on the failure of all defendants to join in the removal be denied.

III. Motion to Amend the Complaint

Plaintiff moves to amend the complaint in the following respects: 1) remove the fourth through sixth claims for civil rights violations; 2) combine the first and third claims for negligence as one common law negligence claim; 3) renumber the second claim as the seventh claim; 4) state three claims (first, third, and fifth) for common law negligence against the individual defendants; 5) state three claims for negligence in the course of employment against entities and individuals pursuant to Cal. Govt. Code §§ 820 and 815.2; 6) rename the seventh claim as the thirtieth claim; and 7) state numerous claims (eight through twenty-nine) based on alleged violations of the California statutes and the Cal. Code of Regs. governing juvenile facilities and their employees. Review of the proposed amended complaint reveals that the claims based on violations of California regulatory law concern alleged violations of duties arising from state-created regulations regarding staffing, training, supervision, creation of manuals, performance of safety checks, suicide prevention, treatment assessments, counseling services, health services, medical treatment decisions, health care standards, health care monitoring, first aid, emergency services, intake screening, health and medical appraisals, mental health treatment, crisis intervention, suicide hazard avoidance, and juvenile facility design relating to persons in custody, and specifically, minors in custody (claims eight through twenty-

nine).

Plaintiff's counsel declares that pursuant to requests to Defendants pursuant to the California Public Records Act (Cal. Govt. Code § 6250 et seq.), further state and local regulations and laws may be identified that will require further amendments. Plaintiff's counsel declares that she has recently learned of the implication of California and local regulations and standards and their application to juvenile facilities; no discovery has been conducted. All relevant witnesses and parties reside in proximity to the Kings County Superior Court; thus, no inconvenience to the parties or witnesses would result from remanding the matter.

Defendants do not oppose the amendment of the complaint. Defendants do request that the Court retain supplemental jurisdiction over the state claims in this matter. In Dillahunty's declaration, it is noted that in her opposition to Defendant's motion to dismiss, Plaintiff's counsel stated that the Kings County Clerk's Office informed Plaintiff's counsel that all judges of the Kings County Superior Court have recused themselves from this matter, and that all hearings and trial would be heard before the Honorable Franklin Jones at the Superior Court for the State of California, County of Fresno. Thus, Defendants argue that the economy of the parties and the interests of justice weigh in favor of the action's proceeding in federal court.

Fed. R. Civ. P. 15(a) provides in pertinent part:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party

> may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

Although the rule is to be construed liberally, leave to amend is not automatically granted. Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir.1990). In determining whether the Court should exercise its discretion to allow amendments, the following factors should be considered: (1) whether the movant unduly delayed seeking leave to amend, or acted in bad faith or with dilatory motive; (2) whether the party opposing amendment would be unduly prejudiced by the amendment; 3) whether there have been repeated failures to cure, and (4) whether amendment would be futile. Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962).

Here, the action has just begun; there has been no discovery or scheduling. There has been no undue delay. No bad faith or dilatory motive appears.

Defendants do not oppose amendment. No prejudice has been shown.

There is no indication that amendment would be futile. Defendants do not raise any insufficiency of the proposed claims. Further, it appears that the amendments concern state law claims.

Therefore, it IS ORDERED that Plaintiff's motion to amend the complaint IS GRANTED. Plaintiff SHALL FILE the proposed amended complaint as the first amended complaint no later than ten days after the date of service of this order.

IV. Retention of Supplemental Jurisdiction

Defendants ask that this Court retain supplemental

jurisdiction over the action, which after the amendment will contain only state law claims. Defendants argue that Plaintiff has attempted to manipulate the choice of forum; further, because the Kings County judges have recused themselves, it would be incorrect to remand the matter to state court.

Title 28 U.S.C. § 1367 provides in pertinent part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
> . . . .
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--
> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

In the present case, the § 1983 claims originally pled were properly removed. Plaintiff has now been given leave to file an amended complaint that deletes the federal claims. The remaining state law claims are so related to the previously pled federal claims that they form part of the same case or controversy over which the Court exercised removal jurisdiction and thus appear to fall within § 1367(a). City of Chicago v. International College of Surgeons, 522 U.S. 156, 167 (1997).

When in a removed case all federal claims have been

dismissed but state law claims remain over which the court has supplemental jurisdiction, the court has the discretion to remand the state law claims to state court, instead of dismissing with prejudice, upon a proper determination that retaining jurisdiction over the case would be inappropriate. Carnegie-Mellon University v. Cohill, 484 U.S. 343, 348-357 (1988) (construing former 28 U.S.C. § 1447(c) and § 1441(c) in light of the court's doctrine of pendent jurisdiction articulated in Mine Workers v. Gibbs, 383 U.S. 715 (1966), which was later substantially codified in amendments to § 1367); see Executive Software v. United States Dist. Ct., 24 F.3d 1545, 1560 (9th Cir. 1994)); Lee v. City of Beaumont, 12 F.3d 933, 937 (9th Cir. 1993). Exercise of supplemental jurisdiction is within the discretion of the Court, United Mine Workers of America v.Gibbs, 383 U.S. 715, 726 (1966), and will be reviewed for clear error, Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303, 1309 (9th Cir. 1992). Where the federal claims have been dismissed, the Court should consider factors of economy, convenience, fairness, and comity. Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d at 1309; Lee v. City of Beaumont, 12 F.3d at 937. In balancing the factors in the usual case involving dismissal of all federal claims, conservation of judicial resources is a weighty factor that will often indicate that declining to exercise jurisdiction over state law claims will be appropriate. Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d at 1309. The Court must state reasons for declining to retain supplemental jurisdiction following dismissal of claims over which it had original jurisdiction. Acri v. Varian Assoc., Inc., 114 F.3d 999, 1000 (9th Cir. 1992).

Here, no resources of the Court have been expended other than administrative energy in filing the various papers. The case has been pending for only a short period of time, and discovery has not even begun. Thus, economy would support the Court's declining to exercise jurisdiction.

Comity favors declining jurisdiction because only state law questions remain, and it is appropriate that a state court determine and apply the many questions of state law that are raised in the amended complaint. The fact that Plaintiff originally filed federal claims does not necessarily mean that a later but diligent choice of a state forum constitutes manipulative conduct. See Baddie v.Berkeley Farms, Inc., 64 F.3d 487 490-91 (9th Cir. 1995). The fact that some recusal of some state court judges has occurred does not ipso facto render the case appropriate for federal court. There is no showing that a state forum is unavailable or inappropriate.

Thus, it will be recommended that the Court decline to exercise supplemental jurisdiction, and that the action be remanded to state court.

VI. Recommendations

Accordingly, it IS RECOMMENDED that

1. The Plaintiff's motion to remand the action to state court because of defective removal BE DENIED; and

2. The Court DECLINE to exercise supplemental jurisdiction over the action, which now contains only state law claims; and

3. The action BE REMANDED to the Superior Court of the County of Kings.

This report and recommendation is submitted to the United

States District Court Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty (30) days after being served with a copy, any party may file written objections with the Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Replies to the objections shall be served and filed within ten (10) court days (plus three days if served by mail) after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: June 28, 2005 **/s/ Sandra M. Snyder**
icido3 UNITED STATES MAGISTRATE JUDGE